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JAMES H. McKENNEY,

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No. 248,

of Arnold for D. C. (mo.)

Filed Mar. 22, 1898.
Supreme Court of the United States.

MAUDE E. KIMBALL,

Plaintiff in Error,

vs.

HARRIET A. KIMBALL, JOHN S. JAMES and
HARRIET L. JAMES,

Defendants in Error.

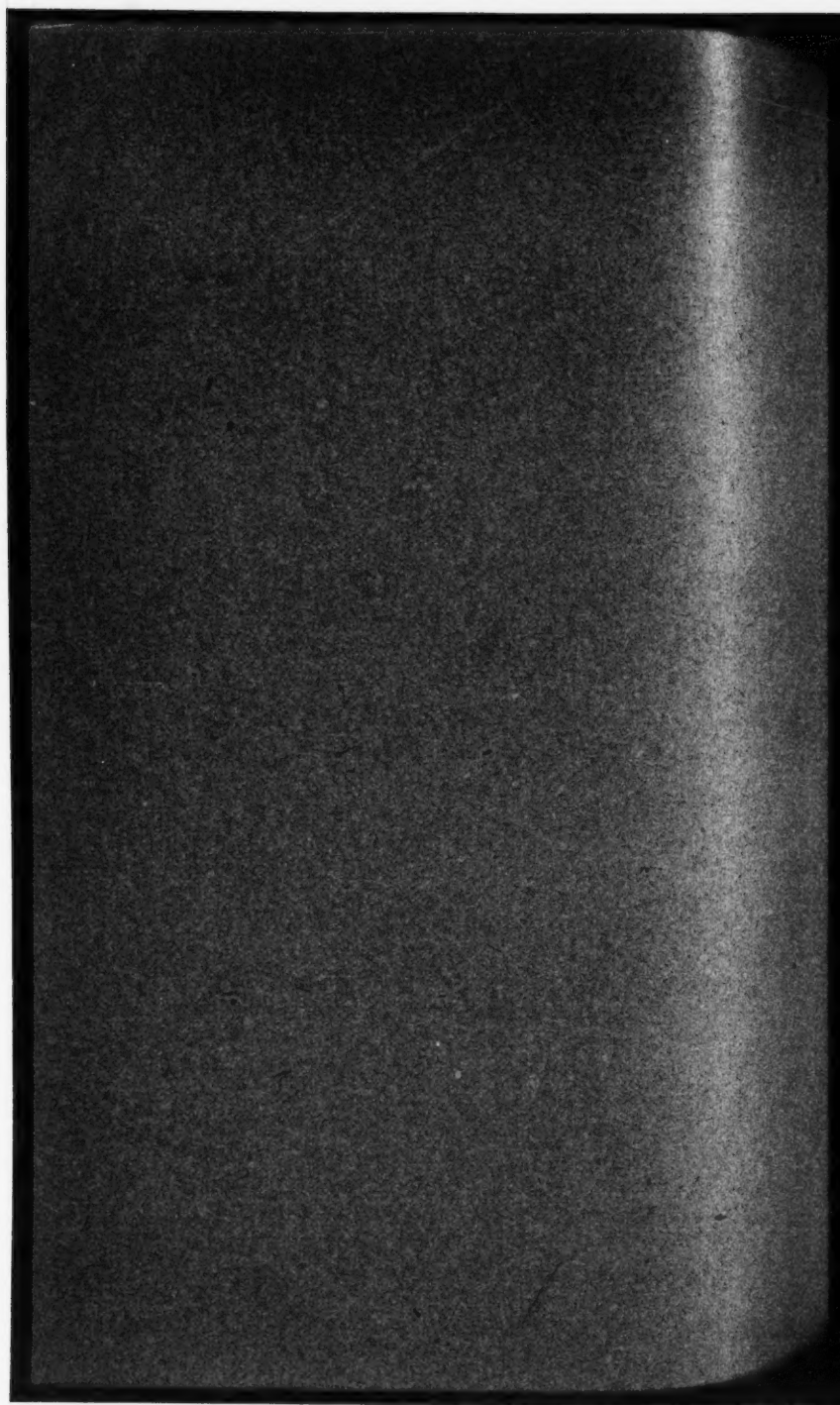
Chief for Defendants in Error on Motion to
dismiss Writ of Error and Papers on
which the Motion is made.

LEMUEL H. ARNOLD,

Counsel for Defendants in Error,

3 BROAD STREET,

New York, N. Y.



In the Supreme Court of the United States.

MAUDE E. KIMBALL,
Plaintiff in Error,

AGAINST

HARRIET A. KIMBALL, HARRIET I. JAMES and
JOHN S. JAMES,
Defendants in Error.

No. 594.

**BRIEF FOR DEFENDANTS IN ERROR ON
MOTION TO DISMISS WRIT OF ERROR.**

This case is brought into this Court by writ of error to review an order of the Court of Appeals of the State of New York allowed by Mr. Justice BREWER and dated the 16th day of February, 1898. (see Writ of Error in printed Transcript of Record, p. 76). The record of the State Court was filed in the office of the Clerk of this Court on the 21st day of February, 1898, a printed copy of which is herewith submitted, and the case is now on the calendar of this Court for the October Term, 1897, as Number 594. The defendants in error have appeared herein by counsel and now move to dismiss the writ of error or affirm the order of the Court of Appeals (see Notice of Motion annexed to this brief).

The motion is made on the verified petition of the defendants in error dated March 17, 1898, which is on file in the office of the Clerk of this Court, a printed copy of which is hereto annexed as well as on the Record from the State Court. Attached to the petition are two exhibits, one of which is an exemplified copy of the proceedings in the Surrogate's Court of the County of Kings, State of New York, on the probate of the last will and Testament of Edward C. Kimball, deceased, marked "Exhibit 1"

(see pp. 19-29 of this brief), and the other is a copy of a letter written by Arnold & Greene, attorneys for the defendants in error, to W. Harlock, Esq., attorney for the plaintiff in error, dated March 25th, 1897, marked "Exhibit 2" (see p. 30 of this brief).

The following is a brief statement of the facts and object of the motion :

Edward C. Kimball died in the City of Brooklyn on the 9th day of November, 1896, leaving him surviving as his only next of kin and heirs at law the defendants in error Harriet A. Kimball, his mother, and Harriet I. James, his sister. He left certain personal property in said city, and was also seized of a one-half interest in certain real estate situated therein subject to the life estate of his said mother. He was a member of the Consolidated Exchange of the City of New York, and on his death, if he left no widow him surviving, a certain sum was payable out of the gratuity fund of said Exchange to his said mother and sister as his next of kin.

On the 10th day of November, 1896, the defendant in error Harriet A. Kimball applied to the Surrogate's Court of the County of Kings for letters of administration of the goods, &c., of Edward C. Kimball, deceased, and she asked in her petition to have the defendant in error John S. James joined with her in the administration of the estate. No will of the deceased had been discovered, although diligent search had been made for one. Mrs. Kimball was advised by her counsel that her son had died unmarried; that although he had entered into a ceremony of marriage with the plaintiff in error such ceremony of marriage was invalid for the reason that the plaintiff in error could not legally make a contract of marriage, because she was a married woman; that while it was true that she had obtained a judgment of divorce from her husband James L. Semon in the District Court of North Dakota, such judgment was null and void for the reason that the Court granting the same did not have jurisdiction to make such judgment; that this appeared on the face of the decree (see Record, pp. 14-16); that such decree was granted by default; that the summons in the action was served on Semon outside of the State of North Dakota and in the State of New York and that Semon did not appear in said action in person or by attorney. On the advice of counsel, Mrs. Kimball stated in her petition for letters of administration that her son died intestate and unmarried and on the 10th day of November, 1896, letters of administration were issued to Mrs. Kimball and Mr. James (see Record, pp. 11, 12).

Thereafter and on or about the 17th day of December, 1896, proceedings were commenced in said Surrogate's Court by the plaintiff in error to have such letters of administration revoked and to have new letters of administration granted to her *as the widow of the deceased* on the ground that the petition on which the original letters of administration were granted contained a false suggestion of a material fact, in that it was alleged that Kimball died unmarried. The relief which the plaintiff in error asked for was as follows:

"Wherefore your petitioner prays for a decree revoking such letters of administration heretofore issued to Harriet A. Kimball and John S. James and awarding to your petitioner letters of administration of the goods, chattels and credits which were of said deceased, and that said Harriet A. Kimball and John S. James and Harriet I. James, the sister of said deceased, may be cited to show cause why such a decree should not be made and why your petitioner should not have such further and other relief as may be meet, and that in the meantime and until the further orders of this Court said Harriet A. Kimball and John S. James and each of them be restrained and enjoined from further acting as administratrix and administrator respectively in the premises."

The defendants in error opposed the application, and the Surrogate's Court made an order on the 8th day of March, 1897, denying the application of the plaintiff in error to revoke letters of administration granted to Mrs. Kimball and Mr. James, and decided incidentally that the plaintiff in error was not the widow of the deceased. All papers in the proceeding in the Surrogate's Court on the application above referred to appear in the printed record, pages 1 to 64. A copy of the order of March 8, 1897, is found in the record, pages 57, 58.

On the 23d day of March, 1897, the last will and testament of Edward C. Kimball was found in an out-of-the-way place in an office which he had occupied in his lifetime (see Petition, p. 15 of this brief). On the 25th day of March, 1897, a petition for the probate of said last will and testament was presented to the Surrogate's Court of the County of Kings by the defendants in error Harriet A. Kimball and Harriet I. James, and on the same day said will was duly admitted to probate and letters testamentary granted thereon to Mrs. Kimball and Mrs. James, the executrices appointed in said will, pursuant to an order of said Surrogate's Court bearing date the 25th day of March, 1897. In this order it was, among other things, adjudged *that the letters of administration issued to Mrs. Kimball and Mr. James on the 10th*

day of November, 1896, be revoked (see p. 27 of this brief). An exemplified copy of said will and testament and of all proceedings on the probate thereof and of said letters testamentary and of said order of March 25th, 1897, will be found on pages 19 to 29 of this brief.

On the same day to wit, on the 25th day of March, 1897 Messrs. Arnold & Greene, the attorneys for the defendants in error, sent a letter to W. Harlock, Esq., attorney for the plaintiff in error in which it was stated that said will had been proved and the letters of administration revoked and a copy of said order of March 25th, 1897, was enclosed (see copy letter, p. 30 of this brief). Instead of moving in the Surrogate's Court to be relieved from the effect of the order of the Surrogate's Court of March 8th, 1897, on the ground of newly discovered evidence growing out of the discovery and probate of Kimball's will, the plaintiff in error took an appeal from said order of March 8th, 1897, to the Appellate Division of the Supreme Court of the State of New York, Second Department, which Court, after hearing the said appeal, duly made an order on the 22d day of June, 1897, affirming the order of the Surrogate's Court so appealed from. The plaintiff then took an appeal from the said order of the Appellate Division of the Supreme Court to the Court of Appeals of the State of New York, which Court after hearing said appeal duly made an order on the 4th day of February, 1898, affirming the order of the Appellate Division so appealed from, and it was from this order of the Court of Appeals of February 4th, 1898, that the writ of error was allowed (see copy papers on appeal in the printed record, pp. 64 to 88).

It further appears from said petition that the marriage ceremony between Kimball and the plaintiff in error was entered into on the 29th day of June, 1895; that the will and testament of said Kimball was executed on the 7th day of June, 1890, and that he disposed of the whole of his estate by said will and testament. There was no issue born to said Kimball and plaintiff in error in the lifetime of said Kimball or afterwards (see p. 16 of this brief).

On the foregoing facts it is respectfully insisted by the defendants in error.

1st. That there is no Federal question necessarily involved in the determination of this case.

2d. That the writ of error does not bring up for rehearing or adjudication any practical question whatever.

3d. That the writ of error does not bring up for rehearing or adjudication the question whether the letters of administration issued to Mrs. Kimball and Mr. James were duly issued for the reason that said letters of administration have already been duly revoked by said Surrogate's Court.

4th. That the writ of error does not bring up for rehearing or adjudication the question whether the plaintiff in error is entitled to letters of administration because it has been duly decided by the Surrogate's Court that Kimball did not die intestate, but left a last will and testament which has been duly admitted to probate and letters testamentary issued thereon, by which decision the plaintiff in error is bound.

POINTS.

I.

The Surrogate's Court of the County of Kings had jurisdiction to grant letters of administration of the goods, &c., of Edward C. Kimball, deceased, to his mother Harriet A. Kimball and to John S. James.

It conclusively appears that Edward C. Kimball was at the time of his death a resident of the County of Kings and died possessed of certain personal property situated in said county. It was then believed that he had died intestate and it was so alleged in the petition on which such letters were granted (see Record, pp. 9, 10).

Section 2476 of the New York Code of Civil Procedure reads as follows :

"The Surrogate's Court of each County has jurisdiction exclusive of every other Surrogate's Court to take proof of a Will and to grant Letters Testamentary thereupon or to grant Letters of Administration as the case requires in either of the following cases :

"1. Where the decedent was at the time of his death a resident of that County whether his death happened there or elsewhere."

See *Comstock vs. Crawford*, 3 Wall., 396-403.

The defendant in error Harriet A. Kimball, the mother of the deceased, was entitled to letters of administration.

Section 2260 of the New York Code of Civil Procedure reads as follows:

*"Administration in case of intestacy must be granted to the relatives of the deceased entitled to succeed to his personal property who will accept the same in the following order: (1) to the surviving husband or widow; (2) to the children; (3) to the father; (4) to the mother." * * **

The defendant in error John S. James was properly joined with Mrs. Kimball in the administration in pursuance of her request contained in her petition (see copy of petition in Record, pp. 9, 10):

*"If there are several persons equally entitled to administration the Surrogate may grant Letters to one or more of such persons, and administration may be granted to one or more competent persons, although not entitled to the same, with the consent of the person entitled to be joined with such person or persons." * * **

N. Y. Code, Sec. 2660.

The petition on which letters of administration were granted contains all the necessary allegations to give the Surrogate's Court jurisdiction to grant the letters.

Redfield's Law & Practice of Surrogate's Courts, pp. 287-296.

II.

The Surrogate's Court had jurisdiction to make the order of March 25th, 1897, admitting Kimball's will to probate, granting letters testamentary and revoking letters of administration granted to Mrs. Kimball and Mr. James.

When the will of Kimball was found the Surrogate's Court had jurisdiction to grant probate thereof, and to issue letters testamentary thereon (see N. Y. Code of Civil Procedure, Sec. 2416, as above quoted).

And it was also the duty of the Surrogate, in the decree admitting the will to probate, to revoke the letters of administration theretofore issued by him to Mrs. Kimball and Mr. James.

N. Y. Code of Code of Civil Procedure, Sec. 2684, reads as follows:

*"Where letters of administration on the ground of intestacy have been granted, a will is admitted to probate and letters are issued thereupon; * * * the decree granting or revoking probate must revoke the former letters."*

The petition on which probate was granted contained all the necessary allegations to give the Surrogate's Court jurisdiction to admit the will to probate and make the order of March 25th, 1897.

Redf. Law and Practice of Surrogate's Court, p. 130.

III.

It cannot be claimed by the plaintiff in error that her marriage to Kimball revoked his will and that therefore she was not bound by the proceedings on the probate thereof, or by the order by the Court therein. His will was made over five years before his alleged marriage to her and disposed of all of his property to his mother and sister. He died without issue born in his lifetime or afterwards.

By 2 Rev. Statutes, State of N. Y., Chap. 6, Title 1, Secs. 42, 43, it is provided as follows :

Sec. 42. *"No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and, when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses."*

Sec. 43. *"If, after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned*

therein as to show an intention not to make such provision ; and no other evidence to rebut the presumption of such revocation shall be received."

IV.

When the Surrogate's Court made the order of March 25th, 1897, which among other things revoked the letters of administration granted to Mrs. Kimball and Mr. James, it granted the relief which the plaintiff in error asked for in her petition and left no practical question for this Court to decide. The relief which the plaintiff in error asked for was twofold: (1) *The revocation of letters of administration granted to Mrs. Kimball and Mr. James;* (2) *that new letters of administration be granted to herself.* But the letters of administration granted to Mrs. Kimball and Mr. James have already been revoked, and letters of administration cannot, of course, be issued to her now, because a will has been found and proved and letters testamentary issued thereon.

N. Y. Code, Sec. 2476, as above quoted.

It is true that the order of the Surrogate's Court of March 8th, 1897, decided incidentally that the plaintiff in error was not Kimball's widow, but that question became an abstract question when the letters of administration which the plaintiff in error sought to have revoked were revoked by the Surrogate. If she desires to be relieved from the effect of that decision she can obtain any relief to which she is entitled from the Surrogate's Court. That Court has the power to grant such relief under Section 2481 of the Code of Civil Procedure, which reads as follows :

Sec. 2481. A Surrogate, in Court or out of Court, as the case requires, has power :

6. To open, vacate, modify or set aside or to enter, as of a former time, a decree or order of his Court ; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case and in the same manner as a court of record and of general jurisdiction exercises the same powers. Upon an appeal from a determination of the Surrogate, made upon an application pursuant to this subdivision, the General Term of the Su-

preme Court has the same power as the Surrogate; and his determination must be reviewed as if an original application was made to that term.

V.

The plaintiff in error cannot impeach the order of the Surrogate's Court of March 25th, 1897, on this motion. That order was made by that Court in the exercise of its judicial authority, and can only be questioned on appeal in the mode provided by the laws of the State of New York for review of determinations of Surrogate's Courts, and its actions respecting them, however irregular, cannot be impeached collaterally.

"By a statute of Wisconsin, under which the administrator was appointed, the only facts necessary to give the probate court jurisdiction were the death of the non-resident intestate and the possession by him, at the time, of personal property within the territory. Both of these facts are recited in the record of the proceedings produced by the defendant, which sets forth the letters of administration at large. These recitals are prima facie evidence of the facts recited (12 Wendall, 102; 28 N. Y., 641). They show the jurisdiction of the Court over the subject. What followed was done in the exercise of its judicial authority, and can only be questioned on appeal. Whether there was a widow of the deceased, or any next of kin, or creditor, who was a proper person to receive letters, if he had applied for them, or to which of these several parties it was meet that the administration should be trusted, were matters for the consideration and determination of the Court, and its action respecting them, however irregular, cannot be impeached collaterally." Comstock vs. Crawford, 3 Wall., 396-407.

See *Fouvergne vs. City of New Orleans*, 18 How., 470-473. *Kelly vs. West*, 80 N. Y., 139.

It follows, therefore, that, although the plaintiff in error was not cited to attend the probate proceeding, because she was not recognized as Kimball's widow, she cannot attack the order of March 25, 1897, on this motion, and is bound by it as if she had been made a party until it is reversed or set aside.

The plaintiff in error evidently desires to have this Honorable

Court pass in this case upon the question of her *status*. That question involves the validity of the judgment of the Court of North Dakota, dated January 26, 1891, in the action brought by her against James L. Semon, her husband, for a divorce, in which action the summons was served upon Semon outside of the State of North Dakota, in which he did not appear in person or by attorney, and in which judgment was taken by default. These facts are recited in the original decree (Printed Record, pp. 14-16), and if it should be held that the original judgment of the District Court of North Dakota was void for want of jurisdiction, other questions will have to be considered, viz., as to the effect of an order made by said Court in proceedings taken by Semon after Kimball's death, and after letters of administration were granted to Mrs. Kimball and Mr. James, to have the original decree of divorce amended *nunc pro tunc*, so as to recite that Semon had appeared and answered in the action and submitted himself to the jurisdiction of the Court, and whether the courts of New York have denied due faith and credit to the judgment of the Court of North Dakota. These are very important questions, which should be decided, not as academic questions, but in an actual litigation. As already stated, there is nothing left to this litigation. If this Honorable Court should entertain the writ of error and deny this motion, and, ultimately, after argument, decide the case in favor of the plaintiff in error on its merits, what practical result will follow from its determination? The Surrogate's Court has already granted the only relief which the plaintiff in error asks in this case, or which can be granted by this Court if it should decide in favor of the plaintiff in error on the merits. This Honorable Court may well turn her over to the Surrogate's Court in the confident expectation that full justice will be done to her in that court.

VI.

The order of the Surrogate's Court of March 8th, 1897, can be sustained on grounds not necessarily involving any Federal question, and for that reason the writ of error should be dismissed.

When letters of administration were granted by the Surrogate to Mrs. Kimball and Mr. James on the 10th of November, 1896, the

original decree of divorce which the Court of North Dakota had granted to the plaintiff in error had not been amended. The original decree recited that the summons had been served outside of the State of North Dakota on the defendant, and that the defendant had not appeared in the action in person or by attorney, and that judgment was taken by default. This judgment was, under the decisions of the Courts of the State of New York, null and void for want of jurisdiction (see Opinion of Court of Appeals in this case in printed Record, pp. 82-89).

It follows, therefore, that the Surrogate could not recognize the plaintiff in error as Kimball's widow under the New York cases. His duty was to follow those cases, even if this Court should be of the opinion that they were decided incorrectly. In other words, the question was, what was the law of the State of New York as to the *status* of the plaintiff in error when letters of administration were issued, not whether that law was right or not. This was a question of local or State law, not a Federal question, arising incidentally in connection with the grant of administration on the estate of a deceased person.

The letters of administration having duly issued, the only ground on which the plaintiff in error could ask to have them revoked was that they contained a false suggestion of a material fact.

See N. Y. Code, Sec. 2585, subdivision 4, which reads as follows :

"In either of the following cases, a creditor or person interested in the estate of a decedent may present to the Surrogate's Court, from which letters were issued to an executor or administrator, a written petition, duly verified, praying for a decree revoking those letters; and that the executor or administrator may be cited to show cause why a decree should not be made accordingly :

"4. Where the grant of his letters was obtained by a false suggestion of a material fact."

And the only allegation in the petition of plaintiff in error in that respect is, that the allegation that Kimball died unmarried was such a false suggestion of a material fact. That statement was

true for the reasons above given, and the order of March 8, 1897, was therefore correct and no federal question arises on an appeal therefrom.

VII.

The only issue in this case relates to the power of the Surrogate's Court to grant and revoke administration on the estate of a deceased person who had died within its jurisdiction.

This Honorable Court has held that jurisdiction over testamentary matters belonged exclusively to the State Courts.

Yenley vs. Lavender, 21 Wall., 276-284.

Fouvergne vs. City of New Orleans, 18 How., 470.

See, also, Langdon vs. Goddard, 2 Story, 267.

As already stated, the *status* of the plaintiff arose incidentally in the case, but the plaintiff in error had an ample remedy in that respect under the provisions of the New York Code of Civil Procedure above quoted. It appears, therefore, that this Court will not review the order of the Court of Appeals for the reason that the State Courts have exclusive jurisdiction of the subject.

VIII.

The writ of error allowed herein should be dismissed.

LEMUEL H. ARNOLD,
Counsel for Defendants in Error,
3 Broad Street,
New York City.

IN THE SUPREME COURT OF THE UNITED STATES.

MAUDE E. KIMBALL,
Plaintiff in Error,

AGAINST

HARRIET A. KIMBALL, HARRIET I. JAMES and
JOHN S. JAMES,
Defendants in Error.

No. 594.

SIR—Take notice that on the printed brief herewith served upon you, to which is annexed a printed copy of the petition of the defendants in error with its exhibits, the original petition having been filed in the Office of the Clerk of the Supreme Court, and on the transcript of record, a printed copy of which having been served upon you, the defendants in error will move this Honorable Court at a stated term thereof to be held at the Capitol in the City of Washington, D. C., on the 11th day of April, 1898, at the opening of the Court on that day, that the writ of error allowed herein be dismissed with costs on the grounds that no Federal question is involved in this case and that there are no practical questions in this case for rehearing or adjudication by this Honorable Court, or that this Honorable Court affirm the order of the Court of Appeals of the State of New York, to which Court said writ of error was allowed with costs, and for such further or other relief as may be just.

Dated New York City, March 19, 1898.

L. H. ARNOLD,

Attorney for Harriet A. Kimball, Harriet I. James and
John S. James, Defendants in Error,

3 Broad Street,

New York City,

Borough of Manhattan,

New York.

To W. HARLOCK, Esq.,

Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

MAUDE E. KIMBALL,
Plaintiff in Error,

AGAINST

HARRIET A. KIMBALL, HARRIET I. JAMES and
JOHN S. JAMES,
Defendants in Error.

No. 594.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF
THE SUPREME COURT OF THE UNITED STATES :

The petition of Harriet A. Kimball, Harriet I. James and John S. James, the defendants in error herein, all of the City of New York, Borough of Brooklyn, in the County of Kings, State of New York, respectfully shows to this Honorable Court as follows, namely :

Edward C. Kimball died in the City of Brooklyn on the 9th day of November, 1896, leaving him surviving as his only next of kin and heirs at law your petitioner Harriet A. Kimball, his mother, and your petitioner Harriet I. James, his sister. He left certain personal property in said city and was also seized of a one-half interest in certain real estate situated therein, subject to the life estate of his said mother. He was a member of the Consolidated Exchange of the City of New York, and on his death, if he left no widow him surviving, a certain sum was payable out of the gratuity fund of said Exchange to his said mother and sister as his nearest of kin. On the 10th of November, 1896, your petitioner said Harriet A. Kimball applied to the Surrogate's Court of the County of Kings, State of New York, for letters of administration of the goods, &c., of Edward C. Kimball, deceased, and she asked in her petition to have your petitioner John S. James joined with her in the administration of the estate. No will of the deceased had been discovered, although diligent search had been made for one. Your petitioners were informed and advised by their counsel that the said Kimball died unmarried; that, although he had entered

into a ceremony of marriage with the plaintiff in error, such ceremony of marriage was invalid for the reason that the plaintiff in error could not legally make such a contract of marriage because she was a married woman; that while it was true that she had obtained a judgment of divorce from her husband, James L. Semon, in the District Court of North Dakota, such judgment was null and void for the reason that the Court granting the same did not have jurisdiction to make such a judgment; that this appeared on the face of the decree granting such divorce; that such decree was granted by default and that the summons in the action was served upon Semon outside of the State of North Dakota and in the State of New York, and that Semon did not appear in the action in person or by attorney. Accordingly, on the advice of counsel, it was stated in said petition for letters of administration that said Kimball died intestate and unmarried, and on the 10th day of November, 1896, letters of administration were issued to Mrs. Kimball and Mr. James.

Thereafter and on or about the 17th day of December, 1896, proceedings were commenced in said Surrogate's Court by the plaintiff in error to have such letters of administration revoked and to have new letters of administration granted to her as the widow of the deceased, on the ground that the petition on which the original letters of administration were granted contained a false suggestion of a material fact in that it alleged that Kimball had died unmarried. Your petitioners appeared in that proceeding by counsel, and after a hearing before the Surrogate he denied the application of the plaintiff in error by an order bearing date the 8th day of March, 1897.

On the 23d day of March, 1897, the last will and testament of Edward C. Kimball, deceased, was found in an out-of-the-way place in an office which he had occupied in his lifetime. On the 25th day of March, 1897, a petition for the probate of said last will and testament was duly presented to the Surrogate's Court for the County of Kings by your petitioners Harriet A. Kimball and Harriet I. James, and on the same day said will was duly admitted to probate and letters testamentary granted thereon to Mrs. Kimball and Mrs. James, the executrices appointed in said will pursuant to an order of said Surrogate's Court bearing date the 25th day of March, 1897. In this order it was, among other things, adjudged that the letters of administration issued to Mrs. Kimball and Mr. James on the 10th day of November, 1896, be revoked and the same were revoked accordingly. An exemplified copy of said will and testament and of all

proceedings on the probate thereof in the Surrogate's Court and of said letters testamentary and of said order of March 25th, 1897, is hereto annexed marked "Exhibit 1."

On the same day, to wit, on the 25th day of March, 1897, Messrs. Arnold & Greene, the attorneys for your petitioners, sent a letter to W. Harlock, Esq., attorney for the plaintiff in error, in which it was stated that said will had been proved and the letters of administration revoked and a copy of said order of March 25th, 1897, was enclosed. A copy of said letter is hereto annexed marked "Exhibit 2." No proceedings have ever been taken by the plaintiff in error in the Surrogate's Court of the County of Kings for any relief from the effect of said order of said Surrogate's Court of March 8th, 1897, in consequence of the discovery and probate of the last will and testament of said Kimball, nor has she attacked the probate of said will, but instead thereof she has persisted in prosecuting certain appeals taken by her from the order of March 8th, 1897, and from the orders made by the Appellate Courts as follows, viz.: She first took an appeal from said order of March 8, 1897, to the Appellate Division of the Supreme Court of the State of New York, Second Department, which Court after hearing said appeal, duly made an order on the 22d day of June, 1897, affirming the order of the Surrogate's Court so appealed from. She next took an appeal from said order of the Appellate Division of the Supreme Court to the Court of Appeals of said State of New York, which, after hearing said appeal, duly made an order on the 4th day of February, 1898, affirming the order of the Appellate Division of the Supreme Court so appealed from. She then obtained from Mr. Justice BREWER, of this Court, a writ of error, and on the 21st day of February, 1898, filed in the office of the Clerk of this Court the record from the State Court; a copy of all the papers in this case in all the State Courts is contained in said record, a printed copy of which is herewith submitted.

And your petitioners further say as follows: The marriage ceremony between Kimball and the plaintiff in error was entered into on the 29th day of June, 1895. The will and testament of Kimball which was admitted to probate was executed on the 7th day of June, 1890, and he disposed of the whole of his estate by said will and testament. There was no issue born to said Kimball and the plaintiff in error in the lifetime of said Kimball or afterwards. Your petitioners are advised by their said counsel that by the laws of the State of New York the said will and testament was not revoked by any subsequent marriage for the reason that the testator disposed of the whole of his estate by his last

will and testament and no issue was born of said marriage either in his lifetime or after his death and the plaintiff in error is not therefore entitled to any portion of his estate which passed under his will even if she were his lawful widow.

And your petitioners deny that the petition made by Mrs. Kimball for letters of administration of the goods, &c., of Edward C. Kimball, deceased, contained a false suggestion of any material fact, and they allege that the allegation that said Kimball died unmarried was absolutely correct when said petition was made and when said letters of administration were granted, for the reason that the decree of divorce which plaintiff in error had obtained as above stated showed on its face on the 10th day of November, 1896, the date of said letters of administration, that the Court of North Dakota did not have jurisdiction to grant the same, and your petitioners were advised by their said counsel that the Surrogate's Court was bound by the laws of the State of New York not to recognize said decree of divorce as it then existed as dissolving the marriage relation between the plaintiff in error and James L. Semon, her husband. The order amending the decree of divorce, whatever effect it may have had on the original decree, was not made until December, 1896, and after said letters of administration had been granted.

Wherefore, your petitioners pray that the writ of error allowed herein be dismissed with costs, or that the order of the Court of Appeals be affirmed with costs, and that your petitioners have such further and other relief as to this Honorable Court may seem just.

Dated New York, March 17, 1898.

HARRIET A. KIMBALL,
HARRIET I. JAMES,
JOHN S. JAMES.

LEMUEL H. ARNOLD,
Of Counsel.

STATE OF NEW YORK, }
County of Kings, } ss. :

HARRIET A. KIMBALL, HARRIET I. JAMES and JOHN S. JAMES, being severally duly sworn, depose and say, each for herself and himself, as follows, namely :

I have heard read the foregoing petition subscribed by me and know the contents thereof, and the same is true of my own knowl-

edge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

HARRIET A. KIMBALL.

HARRIET I. JAMES.

JOHN S. JAMES.

Sworn to before me this 17th }
day of March, 1898. }

FRANCIS H. LUDLOW,

Notary Public,

Kings County, N. Y.

STATE OF NEW YORK, }
County of Kings, } ss.:

I, WILLIAM P. WUEST, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record), do hereby [L. S.] certify that Mr. Francis H. Ludlow, before whom the annexed deposition was taken, was, at the time of taking the same, a Notary Public in and for said County, dwelling in said County, commissioned and sworn and duly authorized to administer oaths for general purposes, and, further, that I am well acquainted with the handwriting of such Notary, and verily believe the signature to said deposition is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Court this 18th day of March, 1898.

WILLIAM P. WUEST,
Clerk.

Exhibit I.**THE PEOPLE OF THE STATE OF NEW YORK,****BY THE GRACE OF GOD FREE AND INDEPENDENT.**

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN,
GREETING :

Know Ye, That we having examined the records and files in the office of the Surrogate of the County of Kings, do find there remaining a certain record of the Will, all papers on probate and Letters Testamentary, In the Matter of the probate of the last Will and Testament of Edward C. Kimball, deceased, in the words and figures following, to wit :

THE LAST WILL AND TESTAMENT OF EDWARD C. KIMBALL OF
THE CITY OF BROOKLYN, KINGS COUNTY, NEW YORK.

I, EDWARD C. KIMBALL of the City of Brooklyn, Kings County, New York, do hereby make, publish and declare this to be my last Will and Testament, that is to say :

FIRST : I hereby give, devise and bequeath to my mother, Harriet A. Kimball, her heirs and assigns forever all the estate, both real and personal, of every name, nature and description and where-soever situated, of which I may die seized or possessed.

Should however my said mother die before my own decease then and in that event I give, devise and bequeath all my estate, both real and personal of every name, nature and description and where-soever situated, to my sister, Harriet I. James, wife of John S. James her heirs and assigns forever.

SECOND : I hereby nominate, constitute and appoint my said mother, Harriet A. Kimball and my said sister Harriet I. James, Executrices and Trustees of and under this my Will and Testament.

THIRD : I hereby revoke all other Wills by me at any time made.

In Witness Whereof I, Edward C. Kimball, the testator, have to this my last Will and Testament set my hand and seal the Seventh day of July in the year of our Lord One thousand eight hundred and ninety.

EDWARD C. KIMBALL (L. S.)

Signed, sealed, published and declared by Edward C. Kimball the testator as and for his last Will and Testament in the presence of us, who were present at the same time, and who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

CARL H. DESILVER 43 Pierrepont St., Brooklyn, N. Y.

WM. H. SUSSDORFF Woodside, N. Y.

HUMPHREY Y. CUMMINS, 166 6th Ave., Brooklyn, N. Y.

KINGS COUNTY SURROGATE'S COURT.

IN THE MATTER

OF

The Probate of the last Will and Testament
of EDWARD C. KIMBALL, deceased.

TO THE SURROGATE'S COURT OF THE COUNTY OF KINGS :

The petition of Harriet A. Kimball and Harriet I. James, of the City of Brooklyn, respectfully shows to this Court :

That they are the executrices named in the last will and testament of Edward C. Kimball, late of the City of Brooklyn, in the County of Kings, deceased.

That the said deceased was at the time of his death a resident of the County of Kings, and departed this life in said county on the 9th day of November, in the year 1896.

That said last will and testament was made at the City of and relates to both real and personal property, and bears date the 7th day of July, 1890, and was signed by Carl H. De Silver, William H. Sussdorff and Humphrey Y. Cummins as witnesses.

That said deceased left him surviving no widow and no issue or descendants.

That all the heirs and next of kin of said deceased are as follows, to wit :

The petitioner Harriet A. Kimball, the mother of deceased, who resides at the City of Brooklyn.

The petitioner Harriet I. James, the sister of deceased, who resides at the City of Brooklyn; and that both are of full age and sound mind.

And your petitioners further allege that said last will and testament of Edward C. Kimball, deceased, was not found by them, nor did they know of its existence until the 23d day of March, 1897; that it was then found in an old pocketbook in a drawer in a desk in the office in the City of New York, formerly occupied by the deceased. That heretofore and on the 10th day of November, 1896, your petitioner, the said Harriet A. Kimball, applied to the Surrogate of the County of Kings for letters of administration of the goods, &c., which were of said Edward C. Kimball, deceased, and to have John S. James joined with her in the administration of said estate, and that on the same day letters of administration were duly issued by said Surrogate to said Harriet A. Kimball and John S. James, appointing them administrators of the goods, &c., of said deceased, and that said administrators duly qualified and have ever since been engaged in the discharge of their duties as such administrators.

And your petitioners pray that the said instrument above described be proved and admitted to probate as a valid will of real and personal property, and that the above-named heirs and next of kin of said testator be cited to attend the probate thereof; and that letters testamentary be granted thereon according to law, and that the letters of administration of the goods, &c., of Edward C. Kimball, deceased, heretofore and on the 10th day of November, 1896, issued by the Surrogate to said Harriet A. Kimball and John S. James, be revoked.

Dated the 25th day of March, 1897.

HARRIET A. KIMBALL.

HARRIET I. JAMES.

STATE OF NEW YORK, }
County of Kings, } ss.:

HARRIET A. KIMBALL and HARRIET I. JAMES, the above-named petitioners, being duly sworn, doth depose and say, each for herself, that she has read the foregoing petition subscribed by her, and that the same is true of her own knowledge except as to the matters

therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

HARRIET A. KIMBALL.

HARRIET I. JAMES.

Subscribed and sworn this 25th }
day of March, 1897. }

FRANCIS H. LUDLOW,
Notary Public,
Kings Co.,
N. Y.

KINGS COUNTY SURROGATE'S COURT.

IN THE MATTER

OF

The Probate of the Last Will and Testament
of EDWARD C. KIMBALL, deceased.

Waiver and
Consent.

We, HARRIET A. KIMBALL and HARRIET I. JAMES, the undersigned, being of full age, and the only heirs and next of kin of Edward C. Kimball, deceased, named in the petition herein, do hereby appear in person and waive the issuance and service of a citation in the above-entitled matter, and consent that the last will and testament of Edward C. Kimball, deceased, bearing date the 7th of July, 1890, be admitted to probate forthwith.

HARRIET A. KIMBALL.

HARRIET I. JAMES.

STATE OF NEW YORK, }
County of Kings, } ss. :

On this day of March, in the year 1897, before me personally came Harriet A. Kimball and Harriet I. James, known to me to be the persons described in, and who executed, the foregoing waiver

and consent, and they severally acknowledged to me that they executed the same.

FRANCIS H. LUDLOW,
Notary Public,
Kings Co.,
N. Y.

SURROGATE'S COURT,
KINGS COUNTY.

IN THE MATTER

OF

The Probate of the Last Will and Testament
of EDWARD C. KIMBALL, deceased.

Deposition of subscribing witness.

STATE OF NEW YORK, }
County of Kings, } ss.:

WILLIAM H. SUSSDORFF, of Woodside, New York, being duly sworn and examined before a Surrogate's Court of the County of Kings, deposes and says:

I was well acquainted with Edward C. Kimball now deceased.

That the subscription of the name of said decedent, at the end of the instrument now shown to me and offered for probate as the last will and testament of the said Edward C. Kimball, deceased, and bearing date the seventh day of July in the year one thousand eight hundred and ninety was made by the said decedent at the City of New York in the presence of myself and the other subscribing witnesses.

That at the time of making such subscription, the said decedent declared the said instrument so subscribed by him to be his last will and testament, and I thereupon signed my name as a witness, at the end of said instrument, at the request of said decedent, and in his presence. I also saw said Humphrey Y. Cummins and Carl H. De Silver, the other subscribing witnesses, sign their names as

witnesses at the end of said will, and know that they did so at the request and in the presence of said decedent.

That the said decedent, at the time of executing the said instrument, was over the age of twenty-one years, of sound mind and memory, and not under any restraint, and competent in every respect to make a will.

WM. H. SUSSDORFF.

Subscribed and sworn this 25th }
day of March, 1897. }

GEO. B. ABBOTT,
Surrogate.

KINGS COUNTY SURROGATE'S COURT.

IN THE MATTER

OF

The Probate of the Last Will and Testament of
EDWARD C. KIMBALL, deceased.

Deposition of
Subscribing Witness.

STATE OF NEW YORK, }
County of Kings, } ss.:

CARLL H. DE SILVER, of the City of Brooklyn, Kings County, N. Y., being duly sworn and examined before a Surrogate's Court of the County of Kings, deposes and says:

I was well acquainted with Edward C. Kimball, now deceased.

That the subscription of the name of said decedent at the end of the instrument now shown to me and offered for probate as the last will and testament of the said Edward C. Kimball, deceased, and bearing date the seventh day of July, in the year one thousand eight hundred and ninety, was made by the said decedent at the City of New York in the presence of myself and the other subscribing witnesses.

That at the time of making such subscription the said decedent declared the said instrument so subscribed by him to be his last will and testament, and I thereupon signed my name as a witness at

the end of said instrument at the request of said decedent and in his presence. I also saw said Humphrey Y. Cummins and William H. Sussdorff, the other subscribing witnesses, sign their names as witnesses at the end of said will and know that they did so at the request and in the presence of said decedent.

That the said decedent, at the time of executing the said instrument, was over the age of twenty-one years, of sound mind and memory, and not under any restraint, and competent in every respect to make a will.

CARL H. DE SILVER.

Subscribed and sworn this 25th }
day of March, 1897. }

GEO. B. ABBOTT,
Surrogate.

KINGS COUNTY SURROGATE'S COURT.

IN THE MATTER

OF

The Probate of the Last Will and Testament
of EDWARD C. KIMBALL, deceased.

Deposition of Sub-
scribing Witness.

STATE OF NEW YORK, }
County of Kings, } ss. :

HUMPHREY Y. CUMMINS, of the City of Brooklyn, County of Kings, N. Y., being duly sworn and examined before a Surrogate's Court of the County of Kings, deposes and says :

I was well acquainted with Edward C. Kimball, now deceased.

That the subscription of the name of said decedent, at the end of the instrument now shown to me and offered for probate as the last will and testament of the said Edward C. Kimball, deceased, and bearing date the seventh day of July, in the year one thousand eight hundred and ninety, was made by the said decedent at the City of New York, in the presence of myself and the other subscribing witnesses.

That at the time of making such subscription the said decedent declared the said instrument so subscribed by him to be his last will and testament, and I thereupon signed my name as a witness at the end of said instrument at the request of said decedent and in his presence. I also saw said Carl H. DeSilver and Wm. H. Sussdorff, the other subscribing witnesses, sign their names as witnesses at the end of said will, and know that they did so at the request and in the presence of said decedent.

That the said decedent, at the time of executing the said instrument, was over the age of twenty-one years, of sound mind and memory, and not under any restraint, and competent in every respect to make a will.

HUMPHREY Y. CUMMINS.

Subscribed and sworn this }
25th day of March, }
1897.

GEO. B. ABBOTT,
Surrogate.

At a Surrogate's Court, held in and for the County of Kings, at the Surrogate's Court Room, in the Hall of Records, in the City of Brooklyn, on the 25th day of March, in the year one thousand eight hundred and ninety-seven.

Present—HON. GEORGE B. ABBOTT, Surrogate.

IN THE MATTER

OF

The Probate of the Last Will and Testament
of EDWARD C. KIMBALL, late of the City of
Brooklyn, deceased.

Decree granting
probate.

Satisfactory proof having been made of the due waiver of service of the citation herein upon, or of the due appearance herein by, all persons entitled to notice of this proceeding;

And the witnesses to said last will and testament of Edward C. Kimball, deceased, having been sworn and examined, their examination reduced to writing and filed, and, it appearing by such proofs, that the said will was duly executed, and that the testator, at the time of executing it, was in all respects competent to make a will, and not under restraint; and this Court, being satisfied of the genuineness of the will, and the validity of its execution, and the probate thereof not having been contested,

It is ordered, adjudged and decreed that the instrument offered for probate herein be, and the same hereby is, admitted for probate as the last will and testament of the said Edward C. Kimball, deceased, valid to pass real and personal property, and that the said will, with the proofs thereof and this decree be recorded, and that letters testamentary be issued to the executrices who may qualify thereunder, and that the letters of administration of the goods, &c., of Edward C. Kimball, deceased, heretofore and on the 10th day of November, 1896, issued by this Court to said Harriet A. Kimball and John S. James, be, and the same hereby are, revoked.

GEO. B. ABBOTT,
Surrogate.

KINGS COUNTY SURROGATE'S COURT.

IN THE MATTER

OF

The Probate of the Last Will and Testament of
EDWARD C. KIMBALL, deceased.

Oath of Executor.

STATE OF NEW YORK, }
County of Kings, } ss.:

We, HARRIET A. KIMBALL and HARRIET I. JAMES, executrices named in the last will and testament of Edward C. Kimball, late of the City of Brooklyn in the County of Kings, deceased, being duly sworn, do depose and say and each for herself deposes and says:

That I reside at Number 6 Pierrepont street in the said City of Brooklyn, that I am over twenty-one years of age, and that I will

well, faithfully and honestly discharge the duties of executrix of said last will and testament.

HARRIET A. KIMBALL.

HARRIET I. JAMES.

Subscribed and sworn to this 25th }
day of March, 1897. }

GEO. B. ABBOTT,
Surrogate.

THE PEOPLE OF THE STATE OF NEW YORK,

BY THE GRACE OF GOD FREE AND INDEPENDENT.

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN, SEND
GREETING:

KNOW YE that, at the City of Brooklyn, in the County of Kings, at a Surrogate's Court held on the Twenty-fifth day of March, in the year of our Lord One Thousand Eight hundred and Ninety-seven, before HON. GEORGE B. ABBOTT, Surrogate of our said County, the last Will and Testament of Edward C. Kimball, late of the City of Brooklyn, deceased, was proved, and is now approved and allowed, by us; and

WHEREAS, the said deceased, at the time of his death, was a resident of the County of Kings, by reason whereof the proving and registering of the said Will, and the granting of administration of all and singular the goods, chattels and credits of the said deceased, and also the judicial settlement of the account thereof, do belong unto the Surrogate's Court of said County, the administration of all and singular the goods, chattels and credits of the said deceased in any way concerning his Will, is granted unto Harriet A. Kimball and Harriet I. James, of Number 6 Pierrepont Street, Brooklyn, Executrices in the said Will named, they being first duly sworn faithfully and honestly to discharge the duties of the said Executrices.

In testimony whereof, we have caused the Seal of the Surrogate's Court of Kings County to be hereunto affixed. Witness, Hon. GEORGE B. ABBOTT, Surrogate of our said County, at the City of

Brooklyn, the 26th day of March, in the year of our Lord One Thousand Eight Hundred and Ninety-seven.

[L. S.]

JOSEPH W. CARROLL,
Clerk of the Surrogate's Court.

All which we have caused by these presents to be exemplified, and the Seal of our said Surrogate's Court to be hereunto affixed.

Witness, Hon. GEORGE B. ABBOTT, Surrogate of the County of Kings, the 3rd day of March, 1898.

[L. S.]

JOSEPH W. CARROLL,
Clerk of the Surrogate's Court.

I, GEORGE B. ABBOTT, Surrogate of said County, and sole presiding Magistrate of the Surrogate's Court, do hereby certify that Joseph W. Carroll, whose name is subscribed to the preceding exemplification, is the Clerk of the said Surrogate's Court of the County of Kings, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogate's Court, and that the attestation thereof is in due form, and according to the form of attestation used in this State.

Witness my hand and the Seal of said Surrogate's Court this third day of March, one thousand eight hundred and ninety-eight.

[L. S.]

GEO. B. ABBOTT,
Surrogate.

STATE OF NEW YORK, }
County of Kings, } ss. :

I, JOSEPH W. CARROLL, Clerk of the Surrogate's Court of the County of Kings, do hereby certify that Hon. GEORGE B. ABBOTT, whose name is subscribed to the preceding Certificate, is the sole presiding Magistrate of the Surrogate's Court of the County of Kings, duly elected, sworn and qualified, and that the signature of said Magistrate to said Certificate is genuine.

In Testimony Whereof, I have hereto set my hand and affixed the Seal of the said Court, this 3rd day of March, 1898.

[L. S.]

JOSEPH W. CARROLL,
Clerk of the Surrogate's Court.

Exhibit 2.

ARNOLD & GREENE,
Counselors at Law,
Drexel Building,
Cor. Wall & Broad Streets.

Lemuel Hastings Arnold.
J. Warren Greene.
Francis H. Ludlow.

Cable Address, "Geotica," New York.

NEW YORK, March 25th, 1897.

W. HARLOCK, Esq. :

DEAR SIR—We beg to inform you that the last Will and Testament of Edward C. Kimball, deceased, was found on the 23rd inst, and that the same has been proved before the Surrogate of Kings County and a decree made by the Surrogate admitting the Will to probate and directing that Letters Testamentary issue to the Executrices named in said Will and revoking the Letters of Administration heretofore, and on the 10th day of November, 1896, issued to Harriet A. Kimball and John S. James, appointing them administrators of the goods, &c., of Edward C. Kimball, deceased, a copy of which Decree we enclose.

Yours truly,

ARNOLD & GREENE.

Enclosure.